86-936

No.:_____

IN THE

Supreme Court of the United States

October Term, 1986

VICTORIA VAMOS,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOEL A. BRENNER
Attorney for Petitioner
76 Tompkins Street
East Northport, New York 11731
(516) 757-9189

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Questions Presented

1. Whether petitioner was competent to be tried and sentenced and whether the procedures for determining her competence were statutorily and constitutionally adequate?
2. Whether petitioner could be convicted of aiding and abetting a violation of the record-keeping requirements of 21 U.S.C. § 843 without proof that she knew the person she was aiding was a "registrant" and without proof that she knew the records were required to be kept by federal law?
3. Whether the "good faith" defense is determined by an objective or subjective standard?
4. Whether "expert" testimony was properly admitted?
5. Whether the imposition of a prison sentence constitutes cruel and unusual punishment?

List of Parties

The trial and conviction from which petitioner now appeals involved no other parties.

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Opinions Below

The decision of the Court of Appeals is officially reported at 797 F.2d 1146 (2d Cir. 1986), and is set forth in Appendix A, pp. 1a-17a.

The decision of the Court of Appeals denying reargument or rehearing *en banc* is not officially reported, and is set forth in Appendix B, pp. 18a-19a.

Jurisdiction

The judgment of the Court of Appeals was entered on July 31, 1986. A timely petition for reargument, with a suggestion for rehearing *en banc*, was denied on September 9, 1986. By order dated October 20, 1986 (per Marshall, J.), petitioner's time to file this petition for a writ of certiorari was extended to and including December 8, 1986.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved

1. The Fifth Amendment to the Constitution of the United States: "No person shall . . . be deprived of life, liberty or property, without due process of law . . . ."
2. The Sixth Amendment to the Constitution of the United States: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defense."
3. The Eighth Amendment to the Constitution of the United States: "[N]or [shall] cruel and unusual punishment [be] inflicted."
4. 18 U.S.C. § 2: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."
5. 18 U.S.C. § 4241: "Determination of mental competency to stand trial.

   (a) Motion to determine competency of defendant.—At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or

shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

(b) Psychiatric or psychological examination and report.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) Hearing.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General.

* * *

(f) Admissibility of finding of competency.—A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged."

6. 18 U.S.C. § 4247: "General provisions for chapter.

* * *

(c) Psychiatric or psychological reports.—A psychiatric or psychological report ordered pursuant to this chapter shall be prepared by the examiner designated to conduct the psychiatric or

psychological examination, shall be filed with the court with copies provided to the counsel for the person examined and to the attorney for the Government, and shall include—

(1) the person's history and present symptoms;

(2) a description of the psychiatric, psychological, and medical tests that were employed and their results;

(3) the examiner's findings; and

(4) the examiner's opinions as to diagnosis, prognosis, and—

(A) if the examination is ordered under section 4241, whether the person is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense;

(B) if the examination is ordered under section 4242, whether the person was insane at the time of the offense charged;

(C) if the examination is ordered under section 4243 or 4246, whether the person is suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another;

(D) if the examination is ordered under section 4244 or 4245, whether the person is suffering from a mental disease or defect as a result of which he is in need of custody for care or treatment in a suitable facility; or

(E) if the examination is ordered as a part of a presentence investigation, any recommendation the examiner may have as to how the mental condition of the defendant should affect the sentence.

(d) **Hearing.**—At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain

adequate representation, counsel shall be appointed for him pursuant to section 3006A. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing."

7. 21 U.S.C. § 802: "Definitions

* * *

(20) The term "practitioner" means a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research."

8. 21 U.S.C. § 822: "Persons required to register

Annual registration

(a) Every person who manufactures, distributes, or dispenses any controlled substance or who proposes to engage in the manufacture, distribution, or dispensing of any controlled substance, shall obtain annually a registration issued by the Attorney General in accordance with the rules and regulations promulgated by him."

9. 21 U.S.C. § 823: "Registration requirements

Distributors of controlled substances in schedules III, IV, and V

(e) The Attorney General shall register an applicant to distribute controlled substances in schedule III, IV, or V, unless he determines that the issuance of such registration is inconsistent with the public interest.

* * *

Research; pharmacies; research applications; construction of Article 7 of Convention on Psychotropic Substances

(f) Practitioners shall be registered to dispense or conduct research with controlled substances in schedule II, III, IV, or V if they are authorized to dispense or conduct research under the law of the State in which they practice. Separate registration under this part for practitioners engaging in research with nonnarcotic controlled substances in schedule II, III, IV, or V, who are already registered under this part in another capacity, shall not be required. Pharmacies (as distinguished from pharmacists) when engaged in commercial activities, shall be registered to dispense controlled substances in schedule II, III, IV, or V if they are authorized to dispense under the law of the State in which they regularly conduct business. Registration applications by practitioners wishing to conduct research with controlled substances in schedule I shall be referred to the Secretary, who shall determine qualifications and competency of each practitioner requesting registration, as well as the merits of the research protocol. The Secretary, in determining the merits of each research protocol, shall consult with the Attorney General as to effective procedures to adequately safeguard against diversion of such controlled substances from legitimate medical or scientific use. Registration for the purpose of bona fide research with controlled substances in schedule I by a practitioner deemed qualified by the Secretary may be denied by the Attorney General only on a ground specified in section 824(a) of this title. Article 7 of the Convention on Psychotropic Substances shall not be construed to prohibit, or impose additional restrictions upon, research involving drugs or other substances scheduled under the Convention which is conducted in conformity with this subsection and other applicable provisions of this subchapter."

10. 21 U.S.C. § 827: "Records and reports of registrants

Inventory

(a) Except as provided in subsection (c) of this section—

(1) every registrant under this subchapter shall, on May 1, 1971, or as soon thereafter as such registrant first engages in the manufacture, distribution, or dispensing of controlled substances, and every second year thereafter, make a complete and accurate record of all stocks thereof on hand, except that the regulations prescribed under this section shall permit each such biennial inventory (following the initial inventory required by this paragraph) to be prepared on such registrant's regular general physical inventory date (if any) which is nearest to and does not vary by more than six months from the biennial date that would otherwise apply;

(2) on the effective date of each regulation of the Attorney General controlling a substance that immediately prior to such date was not a controlled substance, each registrant under this subchapter manufacturing, distributing, or dispensing such substance shall make a complete and accurate record of all stocks thereof on hand; and

(3) on and after May 1, 1971, every registrant under this subchapter manufacturing, distributing, or dispensing a controlled substance or substances shall maintain, on a current basis, a complete and accurate record of each such substance manufactured, received, sold, delivered, or otherwise disposed of by him, except that this paragraph shall not require the maintenance of a perpetual inventory.

Availability of records

(b) Every inventory or other record required under this section (1) shall be in accordance with, and contain such relevant information as may be required by, regulations of the Attorney General, (2) shall (A) be maintained separately from all other records of the registrant, or (B) alternatively, in the case of nonnarcotic controlled substances, be in

such form that information required by the Attorney General is readily retrievable from the ordinary business records of the registrant, and (3) shall be kept and be available, for at least two years, for inspection and copying by officers or employees of the United States authorized by the Attorney General.

Nonapplicability

(c) The foregoing provisions of this section shall not apply—

(1)(A) with respect to any narcotic controlled substance in schedule II, III, IV, or V, to the prescribing or administering of such substance by a pratitioner in the lawful course of his professional practice unless such substance was prescribed or administered in the course of maintenance treatment or detoxification treatment of an individual; or

(B) with respect to nonnarcotic controlled substances in schedule II, III, IV, or V, to any practitioner who dispenses such substances to his patients, unless the practitioner is regularly engaged in charging his patients, either separately or together with charges for other professional services, for substances so dispensed;

(2)(A) to the use of controlled substances, at establishments registered under this subchapter which keep records with respect to such substances, in research conducted in conformity with an exemption granted under section 355(i) or 360b(j) of this title;

(B) to the use of controlled substances, at establishments registered under this subchapter which keep records with respect to such substances, in preclinical research or in teaching; or

(3) to the extent of any exemption granted to any person, with respect to all or part of such provisions, by the Attorney General by or pursuant to regulation on the basis of a finding that the application of such provisions (or part thereof) to such person is not necessary for carrying out the purposes of this subchapter.

Nothing in the Convention on Psychotropic Substances shall be construed as superseding or otherwise affecting the provisions of paragraph (1)(B), (2), or (3) of this subsection."

11. 21 U.S.C. § 841: "Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

* * *

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

* * *

(B) In the case of . . . any controlled substance in schedule III, such person shall, except as provided in paragraphs (4), (5), and (6) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both.

* * *

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than $10,000, or both."

12. 21 U.S.C. § 843: "Prohibited acts C

Unlawful acts

(a) It shall be unlawful for any person knowingly or intentionally—

* * *

(4)(A) to furnish false or fraudulent material information in, or omit any material information from, any application, report, record, or other document required to be made, kept, or filed under this subchapter or subchapter II of this chapter.

* * *

Penalties

(c) Any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine of not more than $30,000, or both."

13. 21 U.S.C. § 846: "Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

14. Federal Rules of Evidence, Rule 702: "Testimony by Experts

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert in knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

15. New York State Education Law § 6902: "Definition of practice of nursing

1 . . . A nursing regimen shall be consistent with and shall not vary any existing medical regimen."

Statement of the Case[1]

Indictment SS 84 Cr. 629, filed in the United States District Court for the Southern District of New York, charged petitioner and others (Dr. Leo Laszlo Sugar, Gloria Reinhardt and Nandor Retek) with (a) distributing controlled substances outside the scope of medical practice (21 U.S.C. §§ 802(21), 812, 841(a)(1), and 841(b)(1)[B]), (b) furnishing false information in documents required to be maintained by federal narcotics law (21 U.S.C. § 843(a)(4)[A]), and (c) aiding and abetting, and conspiring to commit, the foregoing offenses (18 U.S.C. § 2; 21 U.S.C. § 846). After a trial before the Hon. Shirley W. Kram and a jury, petitioner was found guilty and she was sentenced to six months in prison. Petitioner has remained at liberty during the appellate proceedings.

Prior to the trial of this indictment, petitioner was examined with regard to her competence to proceed, and a hearing was had with regard thereto. It is petitioner's contention that that hearing was constitutionally and statutorily defective because (a) the hearing court predetermined to find her competent regardless of the facts elicited at the hearing, (b) petitioner was deprived of her federal constitutional rights to the assistance of counsel and to cross-examination, and (c) procedures mandated by the statutes governing competency hearings were not complied with. Despite the foregoing deficiencies, petitioner contends that the record established that she was suffering from paranoia, delusions, hallucinations and suicidal tendencies which disabled her from understanding the charges against her and assisting counsel in her defense; accordingly, the hearing court finding that she was competent to proceed was "manifestly erroneous."

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[1] Pursuant to Rule 19.1 and 19.2 of the Rules of this Court, counsel for petitioner has requested that the Clerk of the Second Circuit Court of Appeals certify and transmit to this Court (a) the trial transcript and (b) the Appendix for Appellant filed in the Court of Appeals. Between these papers, this Court will have all of the documents necessary for an understanding of the issues posed by this case.

Furthermore, subsequent events before, during and after the trial -- including two psychiatric diagnoses of mental illness and incompetence to proceed -- mandated further competency proceedings; the failure to hold such further proceedings rendered petitioner's trial and sentence constitutionally invalid.

Turning to the trial, witnesses testified that petitioner was a nurse in the office of Dr. Sugar, a physician specializing in "bariatrics" or weight control; there was also testimony from which the jury could have found that certain controlled substances were improperly distributed from that office, that certain records were falsified, and that petitioner was a party thereto. However, the indictment, as drawn, required proof that petitioner knew that the medications were being distributed outside professional medical practice, and such proof was lacking here; in particular, it was petitioner's contention that she had relied, in good faith, on Dr. Sugar's instructions and that that reliance was a complete defense to the unlawful distribution charges. In a related matter, petitioner also contended that the trial court erred in refusing to instruct the jury that petitioner's "good faith reliance" defense was based on petitioner's subjective belief, rather than an objective, "reasonable man" standard.

As for the falsification of records charges, the indictment as drawn required proof that petitioner knew both that Dr. Sugar was a "registrant" required to keep certain records as well as the precise nature of those records; however, both the evidence adduced at the trial and the trial court's instructions on these essential elements were inadequate.

Seeking to remedy the above deficiencies in proof, respondent secured the admission of "expert" testimony on the issues of the right of a nurse to rely on the instructions of a physician and the records required to be kept by federal law. However, neither of the witnesses who gave this testimony was qualified to give expert testimony thereon, and the admission of this testimony deprived appellant of a fair trial.

Last of all, petitioner's lack of competence and related emotional problems rendered the imposition of a prison sentence cruel and unusual punishment.

REASONS FOR GRANTING THE WRIT

I

This Court Should Grant Certiorari to Determine Whether Petitioner Was Properly Found Competent to Proceed.

On the day that the trial of this case was supposed to commence, a hearing to determine petitioner's competence was held instead.

Petitioner's counsel advised the court that he had been unable to discuss the case with petitioner for the preceding three months because of her deteriorating mental condition and that she was "totally beyond reason at this point"; he concluded "I can't defend her" (A. 39-40).[2] Counsel then requested that the hearing court listen to several other attorneys who were moving to be substituted as trial counsel, but the court refused to do so (A. 41).

Dr. Steven Simring, a psychiatrist who had examined petitioner for an hour the previous evening, testified that petitioner had told him stories of threats by law enforcement officials; these included claims that New York City police officers had broken into her apartment and threatened her and that the prosecuting attorney had hired a "headhunter" to cut off her "scalp." The doctor also testified that petitioner had told him that she was in "contact" with the "spirits" of "the dead," and that these spirits were causing all her troubles (A. 62, 68, 69).

Dr. Simring concluded that the allegations of official harassment were "highly unlikely and . . . certainly ha[ve] a delusional flavor," while petitioner's claims of

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[2] Numerical references preceded by "A" are to the Appendix for Appellant which was utilized in the Court of Appeals; as noted previously, counsel has requested that a copy of this Appendix be transmitted to this Court.

contact with "spirits" were "beyond the border of cultural beliefs and indicates some kind of psychopathology." Because of the brevity of his examination, he was unable to render a diagnosis, but did opine that petitioner could be suffering from a "psychiatric difficulty which leads her to exaggerate anxiety and to perceive identities that are delusional" (A. 70). He also stated that if petitioner went off on "tangents" when counsel tried to discuss her case with her, as she had during the psychiatric examination, that would have prevented counsel from effectively assisting her (A. 76-79).

The hearing court refused to allow the doctor to testify whether further examinations would be "indicated or beneficial," and the doctor stated his belief that petitioner was competent (A. 70, 74-75). The court then directed that the trial begin that afternoon (A. 80).

Instead, that afternoon, petitioner entered a plea of guilty to portions of the indictment (A. 83-99). However, shortly thereafter, she retained new counsel who moved to set the plea aside (A. 100-113). In support of the motion, counsel included a report by another psychiatrist (Dr. Alvin Yapalater) who had interviewed petitioner on several occasions.[3] During these visits, the doctor found that petitioner was "extremely disturbed, . . . very agitated, spoke rapidly and almost incoherently . . . "; she was "markedly depressed," had "suicidal thoughts and urges to the extent that I considered psychiatric hospitalization . . . . Her emotions were . . . inappropriate. She cried and laughed at odd times"; he felt she "manifested an acute paranoia . . . [and] the bulk of her perceptions about what was happening were beyond credibility . . . [and] without foundations in reality . . . . I regarded much of what she said as paranoid delusions as well as visual and auditory hallucinations" (A. 110-111).

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[3] The Court of Appeals' opinion incorrectly referred to "a single interview." 797 F.2d at 1150.

Dr. Yapalater concluded as follows:

> I have come to the conclusion, with a reasonable degree of psychiatric certainty, that Mrs. Vamos is suffering from a mental illness known as *paranoid psychosis* with strong depressive features and suicidal tendencies. It appears that her psychotic break with reality began to develop after her indictment .... It is my opinion that she was not mentally capable on the court date of April 16, 1985 [when she pled guilty] nor, probably for a number of months before that, nor was she competent to adequately confer with her attorney (A. 111) (emphasis added).

The court set aside petitioner's plea; however, the court did not order further examinations to determine petitioner's competence to proceed but merely ordered the case again to trial (A. 114-120).

After petitioner was found guilty, additional evidence of incompetence was brought to the attention of the trial court.

The pre-sentence report noted that petitioner had been seeing a psychiatrist in 1982, that she returned to that psychiatrist after her indictment in 1984 because of "anxiety, depression and acute panic . . . [and] suicidal thoughts," that between April 1985 (when she pled guilty and a first pre-sentence report was prepared) and November 1985 (when the second report was prepared), her continued "stress" had taken a "physical toll" and she had "visibly aged"; the report concluded that petitioner's "emotional state appears less than healthy . . . [and s]he apparently would benefit from professional counseling."[4]

Petitioner was also seen by another psychiatrist; he noted the repeated claims of harassment as well as petitioner's inappropriate affect, and he concluded:

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[4] Petitioner's counsel echoed these conclusions of combined psychological and physical deterioration (A. 251-252).

> Mrs. Vamos is suffering from a serious psychiatric disorder, viz. MAJOR DEPRESSION. This is characterized by pervasive, severe depression, anxiety, insomnia and paranoid ideation. This psychiatric condition is most likely related to the severe stress and pressure following her arrest on the instant offense. There has also been . . . psychological decompensation (A. 286).

Despite the foregoing, the lower court proceeded without further examination and imposed a prison sentence (A. 318-330).[5]

This Court has repeatedly ruled that it is a violation of due process to try and/or sentence one who is incompetent, and that procedures must be adequate to protect against such a violation. See, e.g., *Ford v. Wainwright*, 106 S.Ct. 2595 (1986); *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966). Petitioner contends that the proceedings below are in clear violation of these holdings.

In the first place, the hearing court pre-judged the issue of petitioner's competence and determined to find her competent regardless of what the evidence showed. This is established by the following: the court repeatedly stated *prior* to the hearing that petitioner was competent and the case was going to proceed to trial (A. 40-41); the court refused to allow petitioner's new counsel to address the court during the hearing (A. 41); she refused to allow cross-examination or testimony on the critical issue of whether further psychiatric examination was called for (A. 74-75); she allowed the hearing to proceed despite the fact that a written report of the prior psychiatric examination had not been furnished to counsel as required by statute (A. 41); and she never actually made any post-hearing findings, especially a finding that petitioner was competent, although such a finding is also required by statute (A. 79-80).

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[5] Petitioner's incarceration has been stayed by the Court of Appeals.

Secondly, the hearing itself was woefully deficient. Although 18 U.S.C. § 4247(c)(1)-(4)(e) describes the required contents of the written report of any psychiatric examination and directs that a copy be furnished to counsel, the hearing court allowed Dr. Simring to give unsworn oral testimony which contained *no* diagnosis of petitioner's mental state. Although § 4247(d) explicitly gave petitioner the right to the effective assistance of counsel at the competency hearing, the lower court deprived petitioner of that right by refusing to hear counsel. Although the same statute guaranteed petitioner the right to cross-examination, the lower court denied that right to petitioner by refusing to allow counsel to ask Dr. Simring whether further psychiatric examinations would be "indicated or beneficial." Last of all, although § 4241(d) and (f) refer to "findings" that an accused is competent or incompetent, the court never made either such finding after the hearing was concluded.

Chapter 13 of Title 18 of the United States Code (which contains §§ 4241 and 4247) is a relatively new statute and has not been the subject of much, if any, discussion by this Court. This case presents this Court with a host of opportunities to interpret and apply that statute, as well as to explain how prior decisions of this Court are affected by it and affect it.

In the third place, and passing beyond the competence hearing, the overwhelming evidence is that petitioner was *not* competent to proceed or, at the least, that there was a sufficient issue of her competence to require further proceedings.

Prior to the hearing, petitioner's then-counsel stated without contradiction that he had been unable to confer with her for more than three months. The psychiatrist who examined her for the government testified that she told him a bizarre story of police break-ins and pursuit by a "head hunter"; he specifically refused to render a diagnosis because his examination had been too brief. A subsequent psychiatrist, who examined petitioner on several occasions, repeated her bizarre tales and con-

cluded she was incompetent because she was suffering from "paranoid psychosis." The probation department noted her continued physical and mental deterioration, as did her new counsel. And a third psychiatrist confirmed that petitioner was mentally ill from "major depression."

The foregoing established that from the commencement of the criminal proceedings against petitioner her physical and mental condition began deteriorating and at some point in those proceedings (but no later than the beginning of the trial) her condition was such that she was unable to rationally understand the proceedings against her or communicate with counsel in preparing a defense. The contrary decisions of the lower courts must be set aside because they conflict with the previously cited decisions of this Court.

II

This Court Should Grant Certiorari to Determine Whether Proof of Aiding and Abetting a Violation of the Record-Keeping Obligation Under 21 U.S.C. § 843 Requires Proof That the Aider and Abettor Knew That the Person Being Aided Was Required to Keep Certain Records by Federal Law.

21 U.S.C. § 843(a)(4)(A) mandates the keeping of certain records under federal law. The issue presented by this case is whether one may be proven to have aided and abetted a violation of that statute without proof that one knew the person being aided was a "registrant" and without proof that one knew that certain records were required to be kept by federal law.

21 U.S.C. §§ 822, 823 and 827 denominated a physician such as Dr. Sugar a "registrant" who was required to both register and keep certain records pursuant to federal law; § 843 made a violation of those statutes a crime. While the records of the pharmaceutical houses that sent supplies to Dr. Sugar apparently listed him as a "registrant," there is no proof that petitioner knew this. Since only certain persons had to register, and since

this did *not* include all physicians, there is simply no basis for presuming that petitioner knew Dr. Sugar was a registrant.

Furthermore, there was no proof that petitioner knew what records were required to be kept by *federal* law. None of the witnesses testified to this element of the crime. And since not every physician is required to keep federal records (21 U.S.C. § 827(c)(1)[B]), and since what records are required by federal law is a highly technical matter (21 C.F.R. § 1304.01-41), petitioner's knowledge of these matters may not be presumed.

The Court of Appeals seemed to agree with petitioner's general contention that knowledge of the federal registration and record-keeping requirements had to be proven; the Court then held that the trial court had so charged and that the proof had so established (797 F.2d at 1154).

Contrary to the Court of Appeals' holding, however, the trial court did *not* charge the jury that petitioner had to be aware of the federal registration and record-keeping violations. Rather, the trial court merely charged that *Dr. Laszlo* had to be found to be a registrant and that *he* was required to keep certain records (A. 170-172, 180-181). Although the trial court charged that petitioner had to commit her acts "knowingly and intentionally" (*ibid.*), this was merely to prevent a conviction based on mistake, not an instruction that petitioner had to know of the federal registration and record-keeping requirements.

Even assuming the adequacy of the instructions, there was no proof of petitioner's knowledge. Evidence that the false record-keeping occurred after a visit from a *State* investigator (797 F.2d at 1154) was irrelevant to petitioner's knowledge of *federal* registration and record-keeping requirements, particularly since the State investigator explicitly testified that he had told petitioner nothing of federal law (Trial Transcript -- hereafter "T." -- 76-77).

In sum, the jury was not charged, and even if charged could not have found, that petitioner had to know of the federal registration and record-keeping procedures.

III

This Court Should Grant Certiorari to Determine Whether the "Good Faith" Defense Is Determined by an Objective or Subjective Standard.

Throughout the trial, petitioner raised the defense of "good faith," i.e., that she actually and honestly relied on the propriety of Dr. Sugar's orders concerning the dispensation of medication and, accordingly, that she had no wrongful intent. In accordance with this defense, the trial court proposed to instruct the jury that if they found that petitioner relied on Dr. Sugar's instructions, it should find her not guilty (T. 851). However, during a pre-charge conference, and over the strenuous and repeated objections of defense counsel, the court adopted the prosecutor's suggestions and inserted a requirement of "reasonableness" (T. 851-852).

Accordingly, when the jury was charged on this critical matter it was told:

> Therefore, if you find that the defendant *reasonably* relied on the doctor's good faith in dispensing the controlled substance, you must find her not guilty.
>
> * * *
>
> If you find, however, that the doctor was behaving in bad faith, and that the defendant knew or *reasonably* should have known this, you must find her guilty of the crime charged (A. 167).

The Court of Appeals first held that a *physician* cannot defend against a charge of unlawful distribution of narcotics on the ground that he was actually acting in good faith, if that claim was based on his following his own practice even though that was not an accepted course of treatment. 797 F.2d at 1151-3. That is, of course,

the thrust of the holding of this Court in *United States v. Moore*, 423 U.S. 122 (1975). And that holding is unassailable since it follows from the fact that (a) all physicians who dispense narcotics must register, (b) registrants may only dispense such narcotics in the course of legitimate medical practice, and (c) registrants who wish to dispense narcotics outside such a practice, e.g., for research and/or experimental purposes, must obtain prior authorization. Under these circumstances, no registrant could have a reasonable belief that his own unauthorized distribution was within the law. *Id.* at 138-143.

The situation is completely different in the case of petitioner. She was a nurse, not a physician, and was therefore neither a registrant nor otherwise amenable to the vast and intricate web of rules and regulations that registrants must abide by in exchange for the privilege of legally dispensing controlled substances. More to the point, she was charged by New York State law to *follow*, not question, a physician's orders. See New York Education Law § 6902(1) ("A nursing regimen shall be consistent with and shall not vary any existing medical regimen").

Furthermore, under the facts of this case, the change in the instructions was particularly harmful. While it might be difficult, in the abstract, to conceive of an unreasonable, yet good faith, reliance by a nurse on a physician's orders, the facts of this case present just such a situation. Petitioner had worked for Dr. Sugar for many years, beginning as a mere receptionist and then, after going to nursing school at the doctor's urging, rising to become his office manager; he was also the godfather to her two young children. The Court of Appeals itself acknowledged that petitioner regarded Dr. Sugar as "her father-figure and mentor as the result of their close relationship over the years" (797 F.2d at 1153). Under the facts of this case, it was certainly possible for petitioner to have had a good faith, i.e., actual and honest, albeit unreasonable, belief in the propriety of Dr. Sugar's orders.

The Court of Appeals decided that *some* non-registrants, such as nurses, would be held to the same standards of care as physicians (*ibid.*). Such an extension of this Court's holding in *Moore* is without any support in any decided case; if it is to be made, it should be done only by this Court.

IV

This Court Should Grant Certiorari to Determine Whether "Expert" Testimony Was Properly Admitted.

Among the more critical issues the jury in this case had to resolve were the adequacy of the record-keeping procedures, particularly as they related to whether a "good faith medical practice" was being conducted, and whether petitioner was entitled to rely on a physician's directions with regard to dispensing medication to patients. While it is conceded that these matters *could* probably have been the subject of expert testimony, it is petitioner's contention that the two persons called to give that testimony in this case were wholly unqualified to do so, and that the receipt of their testimony deprived her of a fair trial.

Dr. John Morgan was called as an expert in "pharmacology," which he defined as "the science that studies the interaction between chemicals and biological tissue, and in a clinical sense pharmacology also encompasses the . . . characterization and understanding of drugs that are given to people for the treatment of illness" (T. 286). However, the doctor conceded that pharmacology was an "academic science" and that while he had written and taught, he had never practiced medicine "privately," i.e., "in the ordinary sense a doctor practices medicine" (T. 288, 355). Accordingly, while defense counsel accepted the witness as an expert in pharmacology, he objected to him testifying about "record-keeping procedures" because that was outside his area of expertise; these objections were overruled (T. 310, 323).

The doctor was, therefore, permitted to testify both as to what constituted "proper" record-keeping procedures and that the records in the office were not properly kept, and to state that this was a "significant" factor in reaching the conclusion that a "good faith medical practice" was not being conducted (T. 310, 312, 323, 378).[6]

The last witness proposed to be called by the prosecution was Pamela Culbert. When defense counsel asked for an offer of proof as to the relevance of her testimony, the prosecutor asserted she would testify that she taught nursing courses, that nurses were "required to learn" that they could not always rely on the instructions of doctors, that this would show that petitioner was on notice "from whatever source" that she could not always rely on a physician's instructions, and that this was relevant to petitioner's "good faith reliance on physician" defense. Defense counsel responded that Miss Culbert could not testify that petitioner had been so taught;[7] accordingly, he objected to her testimony, but the objection was overruled (T. 617-618).

Miss Culbert testified that she was a professor in the School of Nursing at Pace University and she taught a course in "women's health assessment," i.e., "the anatomy and physiology of the female reproductive system, and how one goes about explaining it, and what the common maladies of the female reproductive system are." She also gave a lecture on post-licensing "certification;" however, she conceded that registered nurses, such as petitioner, only had to be licensed and did not have to be certified (T. 619-621, 632, 634). She conceded that she had never worked as a nurse in the office of a physician who dealt primarily with obesity, and she did not even know what the term "bariatrics" meant (T. 630).

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[6] The testimony of Dr. Morgan on record-keeping was devoid of any references to *federal* requirements.

[7] Miss Culbert taught at Pace University (T. 620); petitioner had attended St. Francis College (A. 249).

She admitted that she had never testified as an expert (T. 633).

Based on the foregoing, defense counsel renewed and repeated his objection to the witness testifying "in any sense as an expert," but the objections were overruled (T. 621-622, 624, 627, 629).

Accordingly, the witness was permitted to testify, in essence, that if a nurse disagreed with a doctor's order she should not comply with it, that petitioner had not participated sufficiently in keeping patient records, and that from her review of the records a "good faith medical practice" was not being conducted (T. 624-629).

After the witness finished testifying, counsel renewed his objection to her testifying "purportedly [as] an expert." As counsel put it:

> She showed a woeful ignorance . . . for someone who purportedly is an expert . . . and her expertise, what there was, was in different areas of nursing . . . woman's anatomy and other health problems.
>
> * * *
>
> It is like calling a criminal lawyer and asking him to testify as to the intricacies of international law (T. 656-657).

The prosecutor asserted that the witness was "clearly expert" on "procedures that nurses had to follow in . . . providing drugs to patients," and the court denied defense counsel's motion to strike her testimony (T. 656-658).

Petitioner contends that neither of the foregoing witnesses was an "expert" in the specialized area to which they testified. Although Dr. Morgan was an expert in pharmacology, he conceded that he had *no* experience in the record-keeping procedures of a day-to-day bariatrics practice; similarly, although Miss Culbert may have been an expert in some aspect of nursing, she also had no expertise re: daily record-keeping procedures. Furthermore, Culbert's teaching of courses on "women's health assessment" and post-licensing "certification" did not qualify her as an expert on whether nurses were obliged *not* to follow certain orders of physicians.

It must be kept in mind that a demonstration of expertise in one area does not qualify one as an expert in a narrower or more specialized area. See, e.g., *George v. Morgan Construction Co.*, 359 F. Supp. 253, 259 (E.D.Pa. 1975) ("An expert must show special knowledge of the very question upon which he is to express an opinion"). In the context of this case, this means that an expert in the field of medicine or nursing was not qualified to testify to sub-specialties within that field. See, e.g., *State v. Nix*, 327 So.2d 301, 345 (La. 1976) (expert in field of medicine *not* qualified as expert in radiology).

In *Delaware v. Fensterer*, 106 S.Ct. 292 (1985) this Court examined the admissibility of expert testimony in the context of the confrontation clause. This case presents the opportunity for examination of such testimony within the context of Rule 702 of the Federal Rules of Evidence. Certiorari should be granted to determine if this testimony fell within this Rule.[8]

V

This Court Should Grant Certiorari to Determine Whether the Imposition of a Prison Sentence in This Case Constitutes Cruel and Unusual Punishment.

It was and is petitioner's contention that she was incompetent to be sentenced. Assuming, *arguendo*, that she was competent, it was nevertheless conceded that she had serious physical, emotional and psychological problems; in particular, the probation department noted her continued physical and mental deterioration, and suggested counseling, and a psychiatrist stated that "incarceration would be devastating and destructive for

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[8] The Court of Appeals' entire discussion of this issue consisted of the bare observation that "The trial judge acted well within her discretion in admitting the testimony of medical experts. Fed. R. Evid. 702." 797 F.2d 1154.

Ms. Vamos." Even the trial court noted that petitioner was "depressed" and that the proceedings against her had been "very traumatic" (A. 330).[9]

In view of the foregoing, and taking into account the reprehensible conditions and facilities in women's prisons (see, e.g., *Dean v. Coughlin,* 623 F. Supp. 392 (S.D.N.Y. 1985), rev'd. on other grounds ____ F.2d ____ (2d Cir. 1986); *United States v. Murphy,* 108 F.R.D. 437 [E.D.N.Y. 1985]), this Court should consider whether the imposition of a prison term constitutes cruel and unusual punishment under the Eighth Amendment. See, e.g., *United States v. Murphy, supra* (house arrest ordered for defendant "where incarceration would 'destroy' her").

Conclusion

For the above-stated reasons, certiorari should be granted and the judgment of the Court of Appeals reversed.

Respectfully submitted,

JOEL A. BRENNER
Attorney for Petitioner
76 Tompkins Street
East Northport, NY 11731
(516) 757-9189

Dated: December 1, 1986

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[9] At the time of the original sentence, petitioner had two young children, aged 4 and 6, and the same psychiatrist who examined her examined them and concluded that her incarceration would be "devastating and destruction for . . . her children." Since that time, petitioner has given birth to another child who is only a few months old at this time.

APPENDICES

Appendix A
Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1314—August Term 1985

Argued: May 23, 1986 Decided: July 31, 1986

Docket No. 85-1476

UNITED STATES OF AMERICA,

Appellee,

—against—

VICTORIA VAMOS,

Defendant-Appellant.

Before:

MANSFIELD, OAKES and MESKILL,

Circuit Judges.

Appeal from a judgment of the Southern District of New York, Shirley W. Kram, *Judge*, convicting appellant of aiding and abetting the distribution of controlled substances outside the scope of medical practice, 21 U.S.C. §§ 812 and 841, furnishing false information in

documents which federal narcotics laws require to be maintained, 21 U.S.C. § 843, and of conspiracy to commit the above offenses, 21 U.S.C. § 846.

Affirmed.

JOEL A. BRENNER, East Northport, NY, *for Appellant*.

BRUCE A. GREEN, Assistant U.S. Attorney, New York, NY (Rudolph W. Giuliani, U.S. Attorney for the Southern District of New York, David S. Hammer, Assistant U.S. Attorney, New York, NY, of counsel), *for Appellee*.

MANSFIELD, *Circuit Judge*:

Defendant Victoria Vamos appeals from a judgment entered in the Southern District of New York after a jury trial before Judge Shirley W. Kram. The jury found Vamos guilty of 13 counts of aiding and abetting the distribution of controlled substances outside the scope of professional medical practice, 21 U.S.C. §§ 812 and 841, five counts of furnishing false information in records which the federal narcotics laws require to be maintained, 21 U.S.C. § 843, and one count of conspiracy to commit the foregoing offenses, 21 U.S.C. § 846. We affirm.

In the late 1970's and early 1980's Victoria Vamos was the nurse and office manager in the office of Dr. Leo

Laszlo Sugar. During the period Dr. Sugar, a New York City physician in private practice, specialized in "bariatrics", or weight control. Dr. Sugar prescribed, and his staff dispensed, large quantities of controlled drugs, specifically, phendimetrazine and phentermine, stimulants which are used as diet pills. Dr. Sugar also provided controlled barbituate sleeping pills to his patients. These drugs are "Schedule III" substances, which have "currently accepted medical use[s] in treatment in the United States" but are susceptible to abuse which "may lead to moderate or low physical dependence or high psychological dependence". 21 U.S.C. § 812(b)(3). Dr. Sugar and his staff sold amounts of these drugs far in excess of medically acceptable dosages to virtually anyone who sought to make purchases.

Until 1978 Vamos, who served as Dr. Sugar's nurse and office manager and eventually became a registered nurse in 1982, dispensed the drugs to patients who returned to the office for additional pills subsequent to their first visit. As Dr. Sugar's practice grew, the task of dispensing pills was assigned to Gloria Reinhart, an assistant in the office. Reinhart testified that on the first few occasions when a patient visited Dr. Sugar's office, the approval of Dr. Sugar or Vamos was required before pills were sold. On subsequent visits, Reinhart was given carte blanche to sell as many pills as the patient desired.

In June 1981, investigators for the New York State Bureau of Controlled Substances visited the office to conduct a biennial "diversion audit", to determine whether the amount of controlled substances ordered by Dr. Sugar since 1979 matched the amount properly dispensed in the course of Dr. Sugar's practice. In conducting this audit the investigators discovered that the office

maintained inadequate records concerning the dispensing of the controlled drugs. The records omitted such essential information as names of patients to whom the substances were sold, quantities of substances dispensed and the relevant dates. The investigators informed Dr. Sugar and Vamos that the records were deficient and that another audit would be conducted.

Following the departure of the investigators, Vamos directed the staff to create false records accounting for the drugs distributed between 1979 and 1981. Assuming that a proper dosage would be one vial of diet pills per week and that over the two years 104 vials could properly be dispensed to a single patient, Vamos calculated the number of patients necessary to make the quantity of drugs dispensed appear proper. Inevitably, the number of patients required for this purpose exceeded the number actually treated by Dr. Sugar. Vamos and the staff solved this problem by adding to the patients' records notations stating that pills had been dispensed to patients who had not received the controlled drugs. They also created records for friends and relatives who never in fact visited the office. The records stated that every patient, real or fictitious, visited the office every week of the two-year period and received one vial of pills each visit. To complete the records, false medical information such as weights and blood pressures were added to each card. Lastly, the group "aged" the records by pouring dirt and stepping on them. During the period of these activities and continuing into 1983 Vamos continued to distribute controlled drugs to Dr. Sugar's patients as in the past.

The case was assigned to Judge Kram on September 20, 1984 and trial was scheduled to begin on April 16, 1985. On the afternoon of April 15, the court ordered a psychi-

atric examination of Dr. Sugar to determine his competency. Although neither the court nor counsel noted that Vamos' behavior was in any way unusual, Vamos expressed a desire to talk with a psychiatrist to discuss "personal stresses", and the court directed that an examination of her also be conducted that evening.

The next morning, Vamos' counsel told the court that "she is totally beyond reason" and unable to assist in the preparation of her defense. Dr. Steven Simring, who had examined both defendants the previous evening, then testified to having serious doubts about Dr. Sugar's competency to stand trial. With regard to Vamos, however, the psychiatrist concluded that she "has an excellent factual and rational understanding of the charges against her, has an excellent understanding of the legal proceedings, and . . . is eminently capable of cooperating with counsel in the preparation of her defense". Simring also testified that Vamos made claims having "a delusional flavor" to the effect that police and the U.S. Attorney threatened her and her children with bodily harm and invasion of her home. He concluded that Vamos "may have some psychiatric difficulty which leads her to exaggerate anxiety and to perceive identities which are delusional" but that these problems did not affect her competency to stand trial. The court found Vamos competent to stand trial and denied counsel's application for a further psychiatric examination.

On April 16, following the colloquy concerning competency, Vamos entered a guilty plea which was accepted by the court. On June 26, represented by new counsel, Vamos moved to withdraw the plea on the grounds that it was coerced by her counsel at the time and, alternatively, that she was incompetent to plead guilty. Vamos' motion

was supported by a psychiatric evaluation by Dr. Alvin Yapalater, which stated that she suffered from "paranoid psychosis with strong depressive features and suicidal tendencies". Although the psychiatrist concluded "she was not mentally competent" on the date the plea was entered, he did not draw any reasoned connection between his diagnosis and Vamos' ability to understand the nature of the proceedings or to confer with counsel. The government did not oppose the motion and Judge Kram vacated the plea without adopting either of the positions urged by Vamos.

A 16-day jury trial was held in September and October 1985. During the course of trial, the issue of competency was not raised by either counsel or the court. At trial Vamos offered two defenses. First, she contended that she was ignorant of the massive quantities of drugs that had been purveyed. To support this contention, she presented witnesses suggesting that two members of the staff, both of whom had testified for the government, actually dispensed the drugs clandestinely and pocketed the proceeds. Second, Vamos' counsel argued that Dr. Sugar served as a mentor and father-figure to her and, to the extent that she was aware of the occurrences in the office, she trusted Dr. Sugar's professional judgment that the treatments were medically proper.

Vamos was convicted on 19 of 30 counts. Vamos' counsel submitted a sentencing memorandum which included a report by Dr. Robert Goldstein, a psychiatrist who examined Vamos on November 30, 1985. Dr. Goldstein concluded Vamos suffered from "a serious psychiatric disorder, viz MAJOR DEPRESSION." Although he indicated "incarceration would be devastating and destructive for Ms. Vamos and her children", his report did

not touch on the issue of competency to stand trial. The court sentenced Vamos to a term of one year's incarceration, six months of which was suspended, and a five-year probationary period.

DISCUSSION

Competency

"It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope v. Missouri*, 420 U.S. 162, 171 (1975). Accordingly, 18 U.S.C. § 4241 provides that at any time prior to sentencing the district court upon its own motion, or that of the defense or prosecution, shall order a hearing to determine the mental competency of the accused "if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." Determination of whether there is "reasonable cause" to believe a defendant may be incompetent rests in the discretion of the district court. *United States v. Oliver*, 626 F.2d 254, 258 (2d Cir. 1980); *Newfield v. United States*, 565 F.2d 203, 206 (2d Cir. 1977).

Vamos contends that the district court abused its discretion by not ordering a competency hearing in compliance with the procedural requirements of 18 U.S.C. § 4247(d). She maintains that the conclusions of Dr. Yapalater and Dr. Goldstein obligated the court to undertake further inquiry of her competence.

Appendix A
Opinion of the United States Court of Appeals

The question of competency to stand trial is limited to the defendant's abilities at the time of trial, *United States v. Makris*, 483 F.2d 1082, 1091 (5th Cir. 1973), *cert. denied*, 415 U.S. 914 (1974), and failure to conduct a full competency hearing is not a ground for reversal when the defendant appears competent during trial. *United States v. Dunn*, 594 F.2d 1367, 1372 (10th Cir), *cert. denied*, 444 U.S. 852 (1979). Accordingly, deference is owed to the district court's determinations based on observation of the defendant during the proceedings. *See Oliver, supra*, 626 F.2d at 258-59; *United States v. Vowteras*, 500 F.2d 1210, 1212 (2d Cir.), *cert. denied*, 419 U.S. 1069 (1974). During the course of the 16-day trial the court did not observe any unusual behavior by the defendant in the courtroom which would provide a basis for doubting Vamos' competence.

Additionally, since incompetency involves an inability to assist in the preparation of a defense or rationally to comprehend the nature of the proceedings, failure by trial counsel to indicate the presence of such difficulties provides substantial evidence of the defendant's competence. Here counsel neither moved for a competency hearing pursuant to § 4241 nor indicated to the court at the time of trial any grounds for doubting the defendant's competence. Indeed, Vamos' ability to assist in her own defense was apparent. For instance, a witness called by the defense testified that Vamos communicated with her and asked her to appear in court on Vamos' behalf. This evidence of competence dispelled any doubt created by the report of Dr. Yapalater, which was based on a single interview approximately four months before trial.

The report of Dr. Goldstein submitted to the court as part of defendant's sentencing memorandum indicated

that Vamos was suffering from depression but did not address issues bearing on ability to confer with counsel and to assist in the preparation of a defense. Dr. Goldstein offered no opinion as to Vamos' competence. It is well-established that some degree of mental illness cannot be equated with incompetence to stand trial. *Hall v. United States*, 410 F.2d 653, 658 (4th Cir.), *cert. denied*, 396 U.S. 970 (1969). Since Dr. Goldstein's report did not link Vamos' illness to her competency to stand trial, and the observations of the court and Vamos' counsel did not provide such a connection, the report did not give rise to reasonable cause to doubt Vamos' competency to do so.

Because Vamos' conduct did not provide a reasonable basis for doubting her competence to stand trial and, to the contrary, indicated that she was an active participant in preparing her case, we reject the contentions that the district court abused its discretion in considering Vamos competent to stand trial or that the court was compelled to conduct a full inquiry into Vamos' competence. *United States v. Zovluck*, 448 F.2d 339 (2d Cir. 1971).

Jury Instruction

Before examining the language of the district court's instruction challenged by Vamos a brief review of governing principles is essential. The Controlled Substance Act, 21 U.S.C. §§ 801, *et seq.* ("CSA") states that "except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally . . . to distribute, or dispense a controlled substance". 21 U.S.C. § 841(a)(1). Absent an exemption or qualification, this law would make it a crime for a doctor or nurse in the course of their professional practice to distribute or dispense a controlled substance to a patient unless it were "done

because of mistake, or accident or other innocent reason." *United States v. Marvin*, 687 F.2d 1221, 1227 (8th Cir. 1982), *cert. denied*, 460 U.S. 1081 (1983). There is no evidence in the present case that Vamos did not act "knowingly and intentionally" in distributing controlled drugs to various persons; indeed, the trial court instructed the jury that the government was required to prove "that defendant knew what she was doing and that she was not acting out of mistake or carelessness".

In order to enable physicians and certain others (e.g., manufacturers) lawfully to distribute or dispense drugs within the course of their professional practice Congress provided that "Persons registered . . . under this subchapter . . . are authorized [to dispense controlled substances] . . . to the extent authorized by their registration and in conformity with the other provisions of this subchapter." 21 U.S.C. § 822(b). Such registration is mandatory if the registrant is authorized to dispense drugs under the law of the state where he or she practices. The Attorney General, acting under authority granted by the CSA, 21 U.S.C. § 821, promulgated regulations providing that controlled drugs may be prescribed "for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice". 21 C.F.R. § 1306.04 (1986). The term "practitioner" is defined by the CSA as a "physician, . . . hospital or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices . . . to distribute, dispense . . . a controlled substance in the course of professional practice". 21 U.S.C. § 802(20). The term "professional practice" refers to generally accepted medical practice; a practitioner is not free deliberately to disregard prevailing standards of treatment.

United States v. Norris, 780 F.2d 1207, 1209 (5th Cir. 1986). In short, the doctor must act in the good faith belief that his distribution of the controlled substance is for a legitimate medical purpose and in accordance with the usual course of generally accepted medical practice. In *United States v. Moore*, 423 U.S. 122, 138-39 (1975), the Court quoted and implicitly approved a jury instruction explaining that a physician could be convicted if the jury found that he knowingly distributed controlled drugs "other than in good faith for detoxification in the usual course of a professional practice and in accordance with a standard of medical practice generally recognized and accepted in the United States." *Id.* at 138-39.

Thus the CSA establishes an enforcement scheme to regulate the legitimate distribution of controlled substances and to halt illegal distribution. H.R. Rep. 91-1444, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 4566, 4567. Various provisions of the Act are designed to control procedures to be followed in legitimate distribution, *see, e.g.*, §§ 821-830, and a medical practitioner's lack of compliance with these provisions may be punishable criminally, 21 U.S.C. §§ 842, 843.[1] Section 841(a), however, is clearly directed at halting distribution outside the scope of a legitimate chain of possession. *United States v. Moore*, *supra*, 423 U.S. at 130. The *Moore* Court held that a physician has no special license to divert the flow of drugs from legitimate medical distribution to illicit commercial trade and that if he does so he may be prosecuted under § 841(a) since he

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1 Accordingly, § 841(a) carries heavier penalties than either §§ 842 or 843, which punish "more or less technical violations". H.R. Rep. No. 1444, U.S. Code Cong. & Ad. News at 4576. *See United States v. Green*, 511 F.2d 1062, 1067 (7th Cir.), *cert. denied*, 423 U.S. 1031 (1975).

then acts as a "drug pusher" rather than as a medical professional. *Moore, supra*, 423 U.S. at 138.

The issue raised by Vamos with respect to the district court's jury charge in the present case is the standard by which the belief of a person claiming to have distributed controlled drugs for legitimate medical uses is to be governed. The court instructed the jury:

> "The final element the government must prove beyond a reasonable doubt is that the defendant dispensed the drugs, or caused them to be dispensed, other than for a legitimate medical purpose and not in the course of medical practice. . . .
>
> * * * * *
>
> "Furthermore, if a doctor dispenses drugs in good faith in medically treating a patient, then the doctor has dispensed the drug for a legitimate medical purpose in the usual course of medical practice; that is, he has dispensed the drug lawfully.
>
> "Good faith in this context means good intentions and the honest exercise of best professional judgment as to a patient's needs. It means that the doctor acted in accord with what he *reasonably* believed to be proper medical practice.
>
> "Therefore, if you find the defendant *reasonably* relied on the doctor's good faith in dispensing the controlled substances, you must find her not guilty. This is true, moreover even if you find that the doctor was not, in fact, dispensing pills for proper medical purposes, *as long as her reliance on his good faith was reasonable under the circumstances.*
>
> "If you find, however, that the doctor was behaving in bad faith, and that the defendant, *knew or*

> *reasonably should have known* this, you must find her guilty of the crime charge." (Emphasis supplied).

Vamos argues that if the jury found that she relied on Dr. Sugar's good faith, she was entitled to a finding of not guilty, whether or not her reliance was "reasonable".[2] We disagree.

The exemption granted to medical practitioners engaged in distribution of controlled substances is a limited one. Because they have been licensed as practitioners and registered under the CSA, they enjoy a privilege not extended to the layman. That privilege, based on the assumption that practitioners, by reason of their expertise and training, will be guided by generally accepted professional practice, carries with it greater responsibilities than those chargeable to the unlicensed person. These added responsibilities are essential to protect the public against abuse by "registrants, who have the greatest access to controlled substances and therefore the greatest opportunity for diversion", *Moore*, *supra*, 423 U.S. at 135.[3]

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2 The government contends that Vamos failed to raise this objection sufficiently below. The record, however, reveals that in reviewing the court's proposed charge Vamos' counsel stated "I would oppose the 'reasonable' language [Assistant U.S. Attorney] Hammer added" and requested that the phrase containing the word "reasonable" be stricken. The prosecutor acknowledged at the time that counsel "disagrees with the term reasonable". When counsel raised the point again after the charge was given to the jury, the court stated that it had ruled on the issue. Although these objections are far from ideal, we find them sufficient to meet the standard of Fed. R. Crim. P. 30. The specificity of counsel's objection combined with indications from both the prosecutor and the court that they understood the claim, reveal that the grounds of the objection were apparent to all involved.

3 In *Moore* the defendant admitted that at the time he prescribed controlled drugs he knew he was deviating from generally accepted medical principles. His defense was that he was employing an experi-

In view of the special responsibilities assumed by a practitioner registered under the CSA we believe that, although not mandated, an instruction that the jury should use an objective standard of reasonableness in deciding whether a practitioner acted in accord with what he believed to be proper medical practice is not improper and does not amount to error. Indeed it is difficult to conceive of a situation, in such a carefully regulated field, in which a registered practitioner would have an "unreasonable" good faith belief that his distribution was for a legitimate medical purpose and in accord with the usual course of generally accepted medical practice. The suggestion that an objective reasonableness standard exposes a physician to criminal responsibility for nothing more than the equivalent of malpractice ignores the fact that in a criminal prosecution the physician may be found guilty only upon proof beyond a reasonable doubt that he acted outside the scope of medical practice, as distinguished from the lesser burden assumed in a civil malpractice suit.

To permit a practitioner to substitute his or her views of what is good medical practice for standards generally recognized and accepted in the United States would be to weaken the enforcement of our drug laws in a critical area. As the Supreme Court noted in *Moore*, "Congress intended the CSA to strengthen rather than to weaken the prior drug laws". 423 U.S. at 139. Faced with a situation similar to that presented here, the Fifth Circuit approved an objective standard for determining what constitutes accepted medical practice, stating, "[o]ne person's treatment methods do not alone constitute a medical prac-

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mental treatment program. 423 U.S. at 126. As a result, the jury charge stressed that a physician cannot deliberately ignore generally accepted principles of medical practice.

tice." *United States v. Norris*, *supra*, 780 F.2d at 1209. The Sixth Circuit has likewise followed an objective "reasonableness" standard, approving an instruction to the effect that a physician's good faith dispensation of a controlled substance in the usual course of his professional practice "connotes an observance of conduct in accordance with what the physician should reasonably believe to be proper medical practice." *United States v. Voorhies*, 663 F.2d 30, 33-34 (6th Cir. 1981).

There remains the question of whether Vamos, who was charged as a co-conspirator, unlawful distributor, and aider and abettor of Dr. Sugar's unlawful conduct, 18 U.S.C. § 2, should be judged by a subjective rather than a reasonableness standard on the ground that she was not the physician-registrant and she may have relied in good faith on Dr. Sugar, whom she regarded as her father-figure and mentor as the result of their close relationship over the years. While those who assist practitioners in distributing controlled drugs clearly cannot be held to the standard of a reasonable practitioner, they are not free to unreasonably rely on the judgment of their employers. Such staff members may only distribute controlled drugs by virtue of the same limited privilege that shields the practitioners whom they assist. The jury in this case was entitled to weigh the fact that a trained nurse such as Vamos is expected to have a higher degree of awareness than the average layman, yet a lower degree of knowledge than a licensed physician. In short, we fail to find anything unfair, improper or prejudicial about application of an objective standard to her conduct as a nurse and office manager. There was ample evidence from which the jury could infer beyond a reasonable doubt that she could not reasonably fail to know that Dr. Sugar was

engaged in unlawful activity and that she intended to help him do so, which is the test. *See United States v. McDaniel*, 545 F.2d 642, 644 (9th Cir. 1976).

Vamos' further contention that the district court erred in not charging the jury that she could be found guilty of furnishing false and fraudulent material in records required to be made and kept under federal narcotics laws, 21 U.S.C. § 843, 18 U.S.C. § 2, only upon proof that she knew of the federal registration and record-keeping requirements needs little discussion. Judge Kram did inform the jury that physicians were required to maintain records of controlled substances sold to patients and that Vamos was charged with falsifying such records. The instructions, when read as a whole, as they must be, *United States v. Whitten*, 706 F.2d 1000, 1019 (9th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984), clearly convey the message that Vamos could only be found guilty if she knew that accurate patients' records were required by law to be kept.[4] But even if the court failed to so state in plain language, the error would be harmless beyond a reasonable doubt in view of the overwhelming evidence of Vamos' guilt of these charges. This evidence included testimony by members of Dr. Sugar's staff of Vamos' decision to create a false record system after Investigator Siegel of the New York State Bureau of Narcotics Control advised her of the inadequacy of the office's records. Staff members testified about Vamos' central role in the fabrication of several hundred patients' dispensing cards containing false statements as to weights, blood pres-

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4 Judge Kram, for instance, emphasized to the jury that the government was required to prove that Vamos acted "knowingly or intentionally" in falsifying the records and that she "knew what she was doing, and was not acting out of mistake or carelessness".

sures, visits, amounts of drugs dispensed and her assignment of Nador Retek to the job of "aging" these records by pouring dirt on them and stamping them with his feet.

We have reviewed Vamos' other claims of error and find them to be without merit. The trial judge acted well within her discretion in admitting the testimony of medical experts. Fed. R. Evid. 702. The statements of co-conspirators challenged as hearsay were properly admitted as statements in furtherance of the conspiracy, the existence of which was established by a fair preponderance of the evidence. *United States v. Paone*, 782 F.2d 386, 390-91 (2d Cir. 1986). Vamos' contention that imposition of any prison sentence in this case would constitute cruel and unusual punishment is plainly frivolous.

The conviction is affirmed.

Appendix B
Order of United States Court of Appeals On Petition for Rehearing and Suggestion for Rehearing In Banc

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the ninth day of September, one thousand nine hundred and eighty-six.

FILED: Septembeer 9, 1986

No. 85-1476

UNITED STATES OF AMERICA,
Appellee,

-against-

VICTORIA VAMOS,
Defendant-Appellant.

A petitioner for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Victoria Vamos,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

Appendix B
Order of United States Court of Appeals
On Petition for Rehearing and Suggestion for
Rehearing In Banc

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ _____

Elains B. Goldsmith,
Clerk